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No. 81-2354

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

UNIFORMED FIREFIGHTERS ASSOCIATION, LOCAL 94, IAFF, AFL-CIO; NICHOLAS MANCUSO, as President of the Uniformed Firefighters Association, Local 94, IAFF, AFL-CIO; STEPHEN ROSENDALE; BRIAN HUGHES; NICHOLAS FORTANO; RICHARD CONLISKEY; FRANCIS McCAFFERY; ROBERT HIGDON; THOMAS SIRIGNO; THOMAS THOMPSON; EDWARD MAIETER and ROBERT ALT, Petitioners,

vs..

THE CITY OF NEW YORK, a municipal corporation; EDWARD KOCH, as Mayor of the City of New York; THE CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK; JUAN ORTIZ, as Chairman of the Civil Service Commission of the City of New York; HARRY AMER, ANNE BUEHLER, NATALIE KNTZ and MARK LEBON, as Commissioners of the Civil Service Commission of the City of New York; THE DEPARTMENT OF PERSONNEL OF THE CITY OF NEW YORK; MICHAEL MADEL, as Director of the Department of Personnel of the City of New York; THE FIRE DEPARTMENT OF THE CITY OF NEW YORK and AUGUSTUS BERRIMAN, as Fire Commissioner of the City of New York, Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether the administrative enforcement scheme set forth in the Comprehensive Employment and Training Act of 1973 (29 U.S.C. §801 et seq., as amended and renumbered by the Comprehensive Employment and Training Act of 1978) ("CETA") indicates a congressional intent to preclude private civil actions for alleged CETA violations commenced under 42 U.S.C. §1983.

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vs.

THE CITY OF NEW YORK, a municipal corporation; EDWARD KOCH, as Mayor of the City of New York; THE CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK; JUAN ORTIZ, as Chairman of the Civil Service Commission of the City of New York; HARRY AMER, ANNE BUEHLER, NATALIE KATZ and MARK LEBOW, as Commissioners of the Civil Service Commission of the City of New York; THE DEPARTMENT OF PERSONNEL OF THE CITY OF NEW YORK; MICHAEL NADEL, as Director of the Department of Personnel of the City of New York; THE FIRE DEPARTMENT OF THE CITY OF NEW YORK and AUGUSTUS BEEKMAN, as Fire Commissioner of the City of New York, Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT OF THE CASE

In June 1975, because of a severe budgetary crisis, the City of New York was compelled to suspend approximately 1,650

uniformed firefighters (6, 31, 46).* Pursuant to Section 81 of the New York Civil Service Law, a preferred eligible list, comprised of all such laid-off firemen, was then promulgated (47). When and if the City's financial situation again permitted the hiring of firemen, the City was required by Section 81 to re-employ firemen from the preferred list in rank order (47).

In November 1975, the City applied for, and was granted, emergency federal funds pursuant to CETA (6, 31, 46-47). The City also obtained additional funds from job opportunity programs of the United States Department of Housing and Urban Development ("HUD") and from local tax levies ("temporary funds")

*References are to pages of the Joint Appendix to the Court of Appeals for the Second Circuit.

(7-8, 47). Consequently, commencing in December 1975, the City was able to re-hire approximately 400 firemen, compensated in part with the CETA, HUD, and temporary funds (6-8, 47-48). However, due to CETA's requirement that participants in the CETA program reside within the City of New York, the City was unable to hire in rank order from the eligible list because many of the laid-off firemen resided outside the City (47-48).*

To avoid prejudicing the non-resident firemen on the preferred eligible list, the

*A detailed explanation of the CETA funding and respondents' re-hiring procedure is found in Carritue v. Beame, 90 Misc. 2d 504 (Sup. Ct., N.Y. Co., 1976), aff'd on opin. below, 61 AD 2d 957 (1st Dept.), mot. for lv. to app. den., 45 NY 2d 710 (1978). The City applied for funds pursuant to subchapter VI of CETA, 29 U.S.C. §961 et seq., which created federal funding for transitional employment of unemployed and underemployed persons in jobs providing needed public services in areas of substantial unemployment. Carritue v. Beame, supra, 90 Misc. 2d at 504.

City classified the re-employed firemen as "provisionals" and did not permit them to accrue seniority credit for promotional purposes during the period of their CETA service (47-48). Each fireman was notified, at the time of his temporary re-employment as a provisional, that he would not receive seniority credit for promotional purposes for the time thus served (6, 7, 8, 48).*

Approximately six months after being hired as provisionals, commencing on or about July 31, 1976, the provisional firemen were notified that their provisional status had been terminated and that they would again be classified as permanent and

*Of the 10 individual firefighters named as plaintiffs, three were re-hired as provisionals in December 1975, two in February 1976, three in July 1976, one in August 1976 and one in February 1977 (13-17).

be permitted to accrue seniority credit for promotional purposes (13-17, 49).*

On or about April 14, 1980, approximately three and a half years after petitioners had been re-employed as provisionals and notified that they would not be permitted to accrue seniority credit, petitioners commenced the within action (2). Respondents moved to dismiss the federal claims on the grounds that petitioners have no private right of action under CETA, there was a rational basis for respondents' decision to deny seniority credit to firemen hired as provisionals, and the complaint is time-barred. Respondents also argued that the pendent state claims should be dismissed for failure to exhaust administrative

*The City's CETA funding expired June 30, 1976. See Carritue v. Beame, supra, 90 Misc. 2d at 506.

remedies (24, 27-28).

In a Memorandum Decision and Order dated April 17, 1981 (Reported at 512 F. Supp. 289), the District Court (POLLACK, J.) granted respondents' motion on the grounds that no private right of action was implied under CETA, or permitted under 42 U.S.C. §1983 based upon violations of CETA and that administrative remedies provided under CETA were exclusive (Pet. App. at pp. 16a-17a). Citing Carritue v. Beame, supra, Judge Pollack further held that since a rational basis supported the decision to deny seniority credit to CETA employees, no claim had been stated under the Equal Protection Clause of the Fourteenth Amendment (Pet. App. at pp. 18a-20a).

The Court of Appeals for the Second Circuit affirmed the District Court's grant of respondents' motion to dismiss

in an opinion dated March 25, 1982, reported at 676 F. 2d 20 (Pet. App. at 1a-9a).

In affirming the District Court's holding that CETA's comprehensive administrative enforcement scheme indicates a Congressional intent to preclude private actions commenced under 42 U.S.C. §1983, the Court of Appeals relied upon this Court's decisions in Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1 (1981), and Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981) (Pet. App. at 6a). Finding that those decisions "qualified the breadth" of this Court's decision in Maine v. Thiboutot, 448 U.S. 1 (1980), which had held that 42 U.S.C. §1983 provides a remedy for alleged state violations of federal statutes conferring substantive federal rights, the Court of Appeals stated (Pet.

App. at 6a):

> In Pennhurst, the Court stated that Thiboutot does not permit use of §1983 to redress a violation of a statute if "the 'governing statute provides an exclusive remedy for violations of its terms,'" .... In Sea Clammers, the Court further observed, "When the remedial devices provided in a particular act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under §1983."

The Court of Appeals examined CETA's remedial scheme and, relying upon its earlier decision in CETA Workers' Organizing Committee v. The City of New York, 617 F. 2d 926, 930-931 (2d Cir., 1980), reiterated (Pet. App. at 7a):

> "The totality of [CETA's remedial] provisions, comprehensive and well-crafted to the Act's administrative, institutional, and political exigencies, affirms the primacy and suggests the exclusivity of the grievance

> procedures, at least in cases seeking redress against a prime sponsor or other recipient of funds."

REASONS FOR DENYING THE WRIT

There is no dispute between the Second and other Circuits as to the proper interpretation of the explicit limitations placed upon the holding in Maine. In fact, the Seventh and Eighth Circuits have both expressly acknowledged that, when determining whether Congress intended to permit a private action under §1983 for a particular federal statutory violation, the first inquiry is whether the statutory remedies are sufficiently comprehensive to evidence a Congressional intent to preclude the §1983 remedy and whether the statute creates a "right, privilege or immunity" within the meaning of §1983. Miener v. State of Missouri, 673 F. 2d 969, 976 (8th Cir., 1982); Anderson v.

Thompson, 658 F. 2d 1205, 1215-1217 (7th Cir., 1981). See also, Hymes v. Harnett County Board of Education, 664 F. 2d 410, 412 (4th Cir., 1981); Baruah v. Young, 536 F. Supp. 356, 363 (D. Md., 1982); Turillo v. Tyson, 535 F. Supp. 577, 580-581 (D. R.I. 1982); Ruth Anne M. v. Alvin Independent School District, 532 F. Supp. 460, 474 (S.D. Texas, 1982).

Petitioners have argued, nevertheless, that their petition should be granted "in order to eradicate the confusion evident in the Second Circuit opinion in applying the rules of Thiboutot and Sea Clammers" (Petition at 9). Petitioners' argument is premised upon their belief that the Court of Appeals' analysis of CETA's remedial scheme was deficient and that the Court's construction of CETA's "saving clause" (29 U.S.C. §816(1)) was

incorrect (Petition at pp. 9-13). Neither position is sustainable.

(1)

Petitioners concede, as they must, that this Court in Sea Clammers limited the breadth of the holding in Maine by explicitly holding that the existence of sufficiently comprehensive remedial devices may suffice to demonstrate Congressional intent to preclude Section 1983 actions for violations of federal statutes (Petition at 8, 10). Petitioner's argument, therefore, is not that the Court of Appeals erroneously interpreted the applicable legal principles, but, rather, that the Court of Appeals incorrectly allocated the burden of proof in applying those legal principles. Petitioners assert that, unlike the private right of action analysis in which the plain-

tiff has the burden of proof, in determining whether Congress intended to preclude a Section 1983 remedy for violations of a federal statute, the defendant has the burden of proof (Petition at p. 8). Petitioners then argue that the Court of Appeals misallocated the burden of proof because it premised its conclusion that an action under §1983 was unavailable upon a prior determination that CETA's enforcement scheme was exclusive, made in an earlier case in conjunction with a private right of action analysis (Petition at 8-9, 13-14).

Petitioners' argument is without merit. Even a cursory reading of the Court of Appeals' opinion reveals that the Court analyzed those two issues independently based upon the different legal principles this Court has indi-

cated are applicable to each (Pet. App. at pp. 5a-9a).

Furthermore, an examination of CETA and its enforcement scheme establishes that there is a sufficient basis to sustain respondents' contention accepted by the Courts' below, that Congress intended to preclude private actions for CETA violations brought under Section 1983. CETA is a funding statute, the purpose of which is to create employment training and opportunities for "economically disadvantaged, unemployed, or underemployed persons" by means of federally-financed coordinated federal and local programs. 29 U.S.C. §801. CETA's primary function is not to create jobs, but to provide participants with employment counselling and short-term training to enable them to market their skills. See, e.g., 29 U.S.C. §§801, 841, 852, 871.

To ensure compliance with CETA's numerous conditions precedent and subsequent, Congress, in 1978, "expand[ed] and clarifie[d]" the enforcement and grievance procedures. S. Rep. No. 891, 95th Cong., 2d Sess. 81, reprinted in [1978] U.S. Code Cong. & Ad. News 4480, 4495. Section 816 (a) mandates that recipients of CETA funding establish a grievance procedure for handling "complaints about the program arising from its participants, subgrantees, contractors and other interested persons." Hearings are required within 30 days of the filing of the grievance and decisions must be rendered within 60 days. Where the recipient of funds is an employer and the participant is an employee of that employer, the recipient must provide a grievance procedure "relating to the

terms and conditions of employment." 29 U.S.C. 816(a)(2). See also, 20 C.F.R. §§676.81 - 676.85.*

Upon exhausting the recipient's grievance system, a complainant may then file a complaint with the Secretary of Labor. The Secretary is required to investigate and render a final determination within 120 days of the receipt of a complaint. 29 U.S.C. §816(b). If the Secretary finds that a recipient has failed to comply with any of the CETA requirements, he may, inter alia,

*The Department of Employment of the City of New York promulgated CETA Participant Complaint Procedures at the inception of the CETA program. Petitioners apparently failed to utilize these procedures despite the fact that seniority credit is a "term or condition" of employment covered by petitioners' collective bargaining agreement. Since §816(a)(1) provides that "the filing of a grievance must be made within one year of the alleged occurrence," petitioners are now barred from seeking administrative review under CETA.

in his discretion, terminate CETA financial assistance, suspend financing, or order the repayment of misspent funds. 29 U.S.C. §§ 816(c)(1)(2), 816(d)(1)(2). However, prior to the imposition of sanctions, the Secretary is required to notify a recipient of the intended sanctions and to provide an opportunity for informal resolution of the dispute. 29 U.S.C. §816(i)(1)(A). Finally, "if any interested person is dissatisfied with or aggrieved by any final action of the Secretary..., within 60 days after notice of such action," such person may seek review of the Secretary's determination in the United States Court of Appeals. 29 U.S.C. §817.

Because CETA provides only for funding and does not actually create jobs, the purposes of the legislation are better served by conventional grievance procedures designed

for efficient, and often informal, resolution of labor-management disputes, as Congress obviously recognized when it provided for the mandatory establishment of procedures for speedy review, articulated in detail in the statute, over which the Secretary of Labor would have the power of administrative review. It is apparent from Section 824(k), which clearly mandates that persons employed in public service jobs be provided with the same benefits and conditions as other workers similarly classified, that Congress intended the remedies available to CETA workers for alleged violations of CETA to be co-extensive with those of non-CETA employees* and to be

*It is noted that petitioners could have initiated grievance procedures pursuant to their collective bargaining agreement or commenced a proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules to review respondents' determinations to deny them seniority credit during the time served as provisional employees.

limited to those specified in §816. It is also obvious, when considering the elaborate and detailed statutory scheme for redress of CETA grievances in light of the purposes of the legislation, that Congress intended the administrative remedy to be exclusive.

To permit §1983 suits for CETA violations would be inconsistent with Congress' express grant of authority to state administrative agencies to resolve CETA disputes, as recipients could bypass the state procedures, thereby rendering them meaningless. This is particularly true in light of this Court's recent decision in Patsy v. Board of Regents, ___ U.S. ___, 102 S. Ct. 2557 (1982), in which it was held that the exhaustion of state administrative remedies is not a prerequisite to bringing an action pursuant to §1983.

It is also important to note that damages are recoverable in §1983 actions. Considering that CETA is essentially a funding statute enacted for the benefit of the states, and that Congress has vested the Secretary of Labor with extensive exclusive enforcement powers, injunctive in nature, it is unlikely that Congress intended CETA participants to be able to recover monetary awards in private actions against recipients of CETA funds. Cf. Anderson v. Thompson, supra, 658 F. 2d at 1215-1217.

The purpose of Section 1983 is to provide a civil remedy for deprivations of federally protected rights. See Parratt v. Taylor, 451 U.S. 527, 535 (1981). The "rights" involved here were created by statute, and are not fundamental rights guaranteed by the

Constitution. The administrative scheme set forth in CETA ensures that a participant's grievance will be heard expeditiously by the recipient of CETA funds and guarantees review of that grievance by federal administrative and judicial tribunals. Those protections sufficiently protect the participant's statutory interest, thereby fulfilling the purpose of a Section 1983 action.

CETA's administrative scheme is, therefore, "sufficiently comprehensive" so as to demonstrate a congressional intent to preclude private actions under §1983. See Middlesex County Sewerage Authority v. National Sea Clammers Association, supra, 453 U.S. at 20.

(2)

Petitioners' other argument, that CETA's "saving clause" (29 U.S.C. §816(1)) conclusively establishes a Congressional intent to permit §1983 actions (Petition, pp. 9,

12) is also without merit. At the outset, it is noted that, in accordance with the directives of this Court, the entire enforcement scheme must be examined to determine whether "the remedial devices provided in a particular act are sufficiently comprehensive" to evidence a congressional intent to preclude suits under §1983. Middlesex County Sewerage Authority v. National Sea Clammers Association, supra, 453 U.S. at 20. For reasons discussed above, respondents submit that the Court of Appeals correctly analyzed CETA's remedial provisions and correctly concluded that they evidenced a congressional intent to make them the exclusive means of redress for CETA violations.

Although petitioners have quoted a portion of the Senate Report which discusses §816(1), urging that that language

"compels the conclusion" that Congress intended to preserve a private remedy for CETA violations under §1983 (Petition, p. 12, ftnt. 4), petitioners omitted to cite another part of the Report also dealing with §816(1) which states (S. Rep. No. 891, supra, [1978] U.S. Code Cong. & Ad. News at 4496):

> The amendment provides that remedies provided do not preclude remedies which are otherwise available under Federal, State or local law. (emphasis added).

This language seems to indicate that the purpose of the saving clause is to protect substantive rights arising under statutes other than CETA.* As the Court of Appeals for the Second Circuit observed in CETA

*One example of such a statute which confers substantive rights upon workers and might well be available to an aggrieved CETA worker is Title VII of the Civil Rights Act, 42 U.S.C. §2000e et seq. See 44 Fed. Reg. 19990, 19994 (1979).

Workers' Organizing Committee v. The City of New York, supra, 617 F. 2d at 930:

> Any reasonable reading of the legislative history leaves us at square one.

Moreover, in Sea Clammers, one of the statutes (33 U.S.C. §1365(e)) construed by this Court included a saving clause containing language substantially the same as that herein. In concluding that the administrative enforcement schemes of both statutes at issue in Sea Clammers were sufficiently comprehensive so as to preclude suits under §1983, this Court apparently did not consider the saving clause to be an obstacle. 453 U.S. at 19-21.

The Court of Appeals applied the proper analysis in determining that an action may not be commenced under §1983 for CETA violations. Petitioners have

failed to demonstrate that the decision of the Second Circuit Court of Appeals is inconsistent with the rulings of this Court or conflicts with decisions in other circuits. Finally, particularly in light of Congress' failure to appropriate funds for the CETA program for the 1982-1983 fiscal year, and Congress' recent passage of a bill to replace CETA (see 29 U.S.C. §822; 128 Cong. Rec. H5061-H5180 (daily ed. , August 4, 1982); 128 Cong. Rec. S7808, S7853 (daily ed. July 1, 1982), the CETA scheme is unlikely to be the subject of future litigation and there would appear to be no compelling issues presented which require review by this Court.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

August 11, 1982.

Respectfully submitted,

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